IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-163

FREDERICK J. HOPMANN,
Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondent

On Petition For Writ Of Certiorari To The Court of Civil Appeals For The Twelfth Supreme Judicial District Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

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CASES

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BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Southern Pacific Transportation Company, Respondent herein, prays the Court deny the petition and submits its Brief in Opposition.

OPINION BELOW

The opinion is printed in Appendix A, page A-1. *Hopmann v. Southern Pacific Transportation Co.*, 581 S.W.2d 532 (Tex. Civ. App.—Tyler, 1979).

JURISDICTION

Respondent asserts that Petitioner has not exhausted his state remedies and, therefore, may not invoke jurisdiction under 28 U.S.C. § 1257(3). This case deals with an interlocutory order involving venue; by definition, it is not a final judgment or decree as required by 28 U.S.C. § 1257(3), on which Petitioner relies.

Petitioner alleges, in part, that by virtue of Texas Revised Civil Statutes (T.R.C.S.), Article 1821, § 5, he has obtained a decision from the highest court in Texas having jurisdiction over this matter. Respondent would show that he has not.

All proceedings to date are prior to trial on the merits and to the entry of a finel judgment in this case. In the case of *Barron v. James*, 145 Tex. 283, 198 S.W.2d 256 (Tex. Sup. 1946), the Texas Supreme Court specifically construed T.R.C.S. Article 1821, § 5 to apply only to appeals from interlocutory orders, and held that it had jurisdiction to review the venue question when properly brought up on appeal from a judgment on the merits. The court also stated:

> ". . . while petitioners could have prosecuted an appeal from the order overruling their plea of privilege, they were not required to do so, but were entitled by proper exception to have the ruling of the trial court on the plea of privilege considered on the appeal from the final judgment . . ." *Barron*, supra, at p. 259.

In a very recent Texas Case, appellant attempted to take an appeal from an adverse interlocutory order on a venue question, as Petitioner here has done, but failed to timely perfect the appeal. After trial on the merits, appeal was taken from the final judgment, bringing along for review the venue question. That court held that the matter could be considered on appeal from the final judgment. *Southwestern Bell Telephone Co. v. Thomas*, 535 S.W.2d 686 (Tex. Civ. App.—Corpus Christi, 1976, reversed on other grounds, 554 S.W.2d 672 [Tex. Sup., 1977]), at p. 689. Also in accord is *Reynolds v. Groce-Wearden Co.*, 250 S.W.2d 749 (Tex. Civ. App.—San Antonio, 1952).

These cases clearly demonstrate that Petitioner has not obtained a final judgment from the highest court in Texas from which a decision may be had; thus Petitioner has not exhausted his state remedies, and this Court should decline jurisdiction.

QUESTION PRESENTED

Whether the Texas venue statute, purely procedural in nature, denies to Petitioner any substantial federal rights granted under the Federal Employer's Liability Act, 45 U.S.C., § 56.

STATEMENT OF THE CASE

Respondent substantially agrees with Petitioner's statement of the case with the exception that the opinion

below did not hold that the Texas venue statute took precedence over the venue provisions of the Federal Employer's Liability Act; the court simply held that the federal venue provision applies to actions filed in the federal courts, while state venue rules apply to actions filed in the state courts.

ARGUMENT

The exact question presented in this case, including the constitutional issue, was raised in *Missouri Pacific Ry. Co. v. Little,* 319 S.W.2d 785 (Tex. Civ. App.—Houston, 1958, cert. denied, 80 S.Ct. 69). This court saw fit to deny the petition in that case and should do so again.

In *Little,* supra, the railroad moved for a change of venue, citing the same Texas statute questioned here. The trial court refused to transfer and the railroad appealed. In a scholarly and well-reasoned opinion, the court noted that the plaintiff is afforded the opportunity to file suit in either state or federal court and that the Congress, in § 56, has prescribed venue for cases in the United States District Courts. The court then stated, at page 789:

> "If the injured employee chooses to sue in the state court . . ., then his suit is subject to the impartial and nondiscriminatory venue statutes of the state."

In interpreting the Federal statute in question, 45 U.S.C. § 56, the Court observed:

> "It is perfectly obvious that in the first sentence of the second paragraph the Congress was undertaking to establish the venue of suits under the Federal Employer's Liability Act brought in 'a District Court of the United States.' Nothing is said concerning the venue of an action that is brought in a state court." *Little,* supra, page 787.

In *Miles v. Illinois Central Ry. Co.,* 315 U.S. 698, 62 S.Ct. 827, 830, 86 L.Ed. 1129 (1942), Mr. Justice Reed, delivering the opinion of the Court, stated:

> "Words were simultaneously adopted recognizing the jurisdiction of the State courts by providing that the Federal jurisdiction should be concurrent. *The venue of the State court suits was left to the practice of the forum." Miles,* supra, at page 830. (emphasis added)

In *Burnett v. New York Central Railway Co.,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), this Court dealt with an F.E.L.A. case from Ohio involving a state venue statute almost identical to the Texas statute. That case was presented on a limitations question, but the Court tacitly approved the Ohio statute. 380 U.S. at page 431.

All these cases illustrate the well-settled doctrine that when a case involving federal law is tried in the state court, the substantive federal law applies, while the procedural law of the state court is followed.

The three cases cited by Petitioner are not in point. In *Arnold v. Panhandle and Santa Fe Railway Co.,* 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), venue was not an issue. The federal right asserted in that case was the right to recover under conflicting jury findings and not the procedural question of venue.

In *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934), the Alabama Court had refused to entertain the F.E.L.A. litigation, denying *jurisdiction* of its courts to the plaintiff. No venue question was involved. In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), the question at issue was the validity of a purported release given by plaintiff prior to trial, and whether his employer had obtained it by fraudulent means. None of the cases cited involve venue questions; none are even remotely pertinent to the question presented by Petitioner.

Respondent readily concedes that a state cannot deprive its citizens of substantial rights granted by federal law. No such deprivation exists by reason of the Texas venue statute here. It is clear that Congress intended the states to have the right to prescribe the venue for the prosecution of Federal Employer's Liability Act suits in the state courts.

CONCLUSION

Respondent respectfully prays that the writ be denied.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, John J. Corrigan, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1979, I served copies of the foregoing Respondent's Brief on opposing counsel by mailing copies in duly addressed envelopes, with first class postage prepaid, to James H. Brannon, attorney for Petitioner, at 810 Houston Bar Center Building, 723 Main Street, Houston, Texas 77002.

_____

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APPENDIX A

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
OF TEXAS

TYLER, TEXAS

NO. 1210

FREDERICK J. HOPMANN, Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellee

Appeal From The 113th Judicial District Court
Of Harris County, Texas

This is a venue case. Appellant, Frederick J. Hopmann, brought suit in the district court of Harris County, Texas, under the Federal Employer's Liability Act, 45 U.S.C.A., subsection 51, et seq., seeking to recover damages for personal injuries sustained while employed as a brakeman for appellee, Southern Pacific Transportation Company. The incident was alleged to have occurred on June 23, 1977, at Luling, Caldwell County, Texas. Appellant alleged in his petition that he was a resident of Bexar County, Texas, at the time of the occurrence in question and that the appellee was a railroad cor-

poration engaged in interstate commerce doing business in Harris County, Texas, where it maintained its offices and place of business.

Appellee duly filed a plea of privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, subdivision 25, Vernon's Annotated Texas Civil Statutes. Appellant responded with a controverting affidavit alleging that under Article 1995, supra, venue was properly laid in Harris County due to the fact that appellant does business in Harris County and maintains its offices and principal place of business there. After a hearing before the court, without a jury, the trial court sustained Southern Pacific's plea of privilege and ordered that the cause be transferred to Bexar County, Texas, from which order appellant perfected this appeal.

On the venue hearing, it was stipulated that: (1) plaintiff was employed by defendant, Southern Pacific Transportation Company, on the date of his alleged injury on July 23, 1977; (2) the injury occurred in Caldwell County, Texas; (3) at the time of his injury plaintiff was a resident of Bexar County, Texas; (4) that at all times material to this suit Southern Pacific Transportation Company was doing business in Harris County, Bexar County and Caldwell County; (5) that for the purpose of venue only, it was stipulated that plaintiff's pleading alleged a cause of action for venue purposes under the Federal Employer's Liability Act, and that all necessary facts to support the pleading had been established; and (6) that if the plea of privilege was sustained by the trial court, it was stipulated that plaintiff's suit would be transferred to Bexar County, Texas.

Under the first point, appellant contends that the trial court erred in transferring the cause to Bexar County because federal law governs, and under Title 45, U.S.C.A., subsection 56, this suit was properly brought in Harris County.

Subsection 56 of the Federal Employer's Liability Act provides, in part, as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Appellant takes the position that since the Act provides that the jurisdiction of the federal and state courts shall be concurrent, the state courts are obligated to apply the venue provisions provided by the Act. He argues that the right to select the forum and maintain suit in any county where appellee does business, is a substantial right granted by congress, and to apply subdivision 25 of the Texas Venue Statute would deny him that right and would thwart the express purpose of the Federal Employer's Liability Act.

The railroad company, on the other hand, contends that venue is controlled by subdivision 25 of Article 1995, supra, the material part of which reads as follows:

> "25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for

damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. . . ."

In our view, the precise issue now presented was previously decided in Missouri Pacific Ry. Co. v. Little, 319 S.W.2d 785 (Tex. Civ. App.—Houston 1958, no writ history, cert. den., 80 S.Ct. 69, 194). In the Little Case, the railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County, and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employer's Liability Act and suit was filed in Houston, Harris County, Texas. At the state district court level, the plaintiff's employer, Missouri Pacific Ry. Co., sought, by way of plea of privilege, to remove the cause to the county in which the plaintiff resided and in which he sustained the injury. Missouri Pacific based its contention on Article 1995, subdivision 25, supra, just as the appellant does in this case. The district court overruled the railroad's plea of privilege and the railroad appealed. The Houston Court of Civil Appeals reversed the case and ordered the cause transferred to McLennan County. In holding that subdivision 25 of the Texas Venue Statute (Article 1995) was controlling and that the venue provisions of section 56 of the Federal Employer's Liability Act were not applicable to suits filed in state courts, the court of civil appeals stated at page 787:

"It is perfectly obvious that in the first sentence of the second paragraph of Section 56 the Congress

was undertaking to establish the venue of suits under the Federal Employers' Liability Act brought in '*a district court of the United States.*' (Emphasis supplied.) Nothing is said concerning the venue of an action that is brought in a state court.

"The legal doctrine that the clear expression of the one excludes the other is so ancient that it comes down to us in the time-honored maxim 'expresso unius est exclusio alterius.'

"After prescribing venue in the United States courts, Section 56 then provides, 'The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.' This provision is concerned with jurisdiction, not venue."

In support of its decision the court of civil appeals cited the case of Miles v. Illinois Central Ry. Co., 1942, 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, involving a Federal Employer's Liability Act case, wherein the court stated at page 788:

" 'Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. *The venue of state court suits was left to the practice of the forum.*' (Emphasis ours.)"

In Baltimore & Ohio Ry. Co. v. Kepner, 1941, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, the Supreme Court held that a state could not validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employer's Liability Act in the federal court of another state, since under the supremacy clause the venue section of the federal Act was controlling. While the ruling in that

regard is irrelevant to the present inquiry, it is significant to note that in the course of the opinion the Supreme Court made this statement at page 9 of 62 S.Ct.: "*Section 6 (45 U.S.C.A. sec. 56) establishes venue for an action in the federal courts.*" (Emphasis ours.)

We have found no case, and have been cited none, holding that venue provisions of sec. 56 of the federal statute is applicable to actions filed in a state court. The statements made by the United States Supreme Court in the cases cited above clearly indicate that Section 56 of the Act is to be interpreted as establishing venue for an action in the federal courts and that venue in state court actions are controlled by the venue statutes of the forum. Since appellant filed his suit in the Texas court, the federal venue statute was not applicable. Accordingly, appellant's first point is overruled.

Under the second point, appellant contends that the provisions of subdivision 25 of Article 1995, supra, are not mandatory but were enacted for the benefit of the plaintiff, thus giving him a right to elect to either follow subdivision 25 or to sue appellant at its domicile in Harris County.

It has long been the law in this state that subdivision 25 of Article 1995 is mandatory and that suits controlled by this subdivision must be commenced in the particular county mentioned therein without reference to whether or not it is the domicile of the defendant. Lewis v. Gulf, C. & S.F. Ry. Co., 229 S.W.2d 395 (Tex. Civ. App.—Galveston 1950, writ dism'd); Texas & N.O.R. Co. v. Tankersley, 246 S.W.2d 253 (Tex. Civ. App.—San Antonio 1952, no writ); Missouri Pacific Ry. Co. v. Little, supra; see also Kinney v. McCleod, 9 Tex. 78 (1852).

In Lewis v. Gulf, C. & S.F. Ry. Co., supra at 397, the Galveston court summarized the rights of the parties under the mandatory provisions of Article 1995 in the following language:

> "It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of defendant's residence, upon the filing of the proper plea."

Applying the foregoing rules of law to the facts of the present case, it is obvious that appellant cannot maintain venue in Harris County, Texas, in face of the mandatory provision of the Texas statute providing otherwise. Appellant's second point of error is overruled.

By the third and final point, appellant argues that if subdivision 25 of Article 1995 is mandatory, then it is unconstitutional because it denies substantial federal rights. Specifically, he contends that if subdivision 25 is mandatory it is unconstitutional because it not only deprives him of one of the substantial rights given to him by the federal Act, but also it discriminates against him and causes a lack of uniformity in the application of the federal Act. However, no authority is cited for this proposition. After considering appellant's argument, we are convinced that it is without merit.

The F.E.L.A. claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. Boyd v. Grand Trunk Western Ry Co., 338 U.S. 263, 70 S.Ct.

26, 94 L.Ed. 55 (1949); Missouri Pacific Railroad Company v. Little, supra. The substantial right granted, however, applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state. Miles v. Illinois Central Ry. Co., supra; Missouri Pacific Ry. Co. v. Little, supra. It is clear that the Congress did not intend to give the F.E.L.A. claimant who files in the state court the same venue rights as those provided for in suits in the federal court, otherwise the Congress would have said so. When appellant elected to file his suit in the state court, he no longer had federal venue rights subject to protection. Consequently, the application of the Texas venue statute would not defeat or curtail any of the appellant's federal venue rights. Since the Texas venue statute deprived him of no federal right, it follows that it could not be unconstitutional and void on such grounds.

Further, we find that we are unable to agree with appellant's contention that the mandatory provisions of subdivision 25 of Article 1995 renders the Texas statute discriminatory and in violation of the 14th Amendment of the Constitution of the United States. This same question was addressed by the Court in Missouri Pacific Ry. Co. v. Little, supra. After reviewing the Texas statute in question, the court in that case concluded, at page 788, that the statute fully protects the plaintiff and could not, in any way, be construed as discriminatory. After a careful review of the statute, we are convinced that the court in that case reached the proper result and that the statute should not be struck down on that basis.

It follows from what we have said that we are of the opinion that appellant had no legal or constitutional right to maintain venue in Harris County, Texas.

Accordingly, the judgment of the trial court is affirmed.

JAMES H. MOORE
Associate Justice

Opinion delivered May 3, 1979.

APPENDIX B

FEDERAL STATUTES

§ 1257. State courts; appeals; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and he decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§ 56 Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

TEXAS STATUTES

Art. 1821. [1591] [996] Judgment conclusive on law

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute.

2. All cases of slander.

3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a Statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts except where appellate jurisdiction is given to the Supreme Court and not made final in said Courts of Civil Appeals.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728. Acts 1st C.S. 1892, p. 25; Acts 1923, p. 110; Acts 1929, 41st Leg., p. 68, ch. 33, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 2.

Art. 1995. [1830] [1194] [1198] Venue, general rule

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

* * *

25. Railway personal injuries.—Suits against railroad corporations, or against any asignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said

suit, shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

* * *

APPENDIX C

NO. 1210

IN THE COURT OF CIVIL APPEALS
FOR THE TWELFTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT TYLER

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Appellee

APPEALED FROM THE 113TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLEE

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PRINTER'S NOTE:
Index for Brief Omitted

NO. 1210

IN THE COURT OF CIVIL APPEALS
FOR THE TWELFTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT TYLER

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Appellee

APPEALED FROM THE 113TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLEE

TO THE HONORABLE COURT OF CIVIL APPEALS:

NATURE OF THE CASE

This is an action brought by Appellant under the Federal Employers Liability Act, 45 U.S.C.A. Subsection 51, et. seq. in which he seeks to recover damages resulting from personal injuries sustained while he was per-

forming his duties as a brakeman for the Southern Pacific Transportation Company. This incident allegedly occurred on June 23, 1977, at Luling, Caldwell County, Texas; Appellant alleged to have resided in Bexar County, Texas, at the time of the occurrence in question; suit was filed by his Houston attorneys in the State District Court of Harris County, Texas, on December 29, 1977.

Appellee duly filed a Plea of Privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, Subdivision 25, Revised Civil Statutes of Texas. (Tr. 6) Appellant responded with its Controverting Affidavit (Tr. 11) and on February 27, 1978, the Plea of Privilege was heard before the 113th Judicial District Court of Harris County, Texas. The Court sustained Appellee's Plea of Privilege and ordered that the cause be transferred to Bexar County, Texas. (Tr. 14) From such order Appellant has perfected this appeal.

COUNTERPOINTS

Counterpoint One

THE TRIAL COURT DID NOT ERR IN HOLDING THAT TEXAS LAW APPLIES AND IN SUSTAINING APPELLEE'S PLEA OF PRIVILEGE PURSUANT TO ARTICLE 1995, SUBDIVISION 25 OF THE REVISED CIVIL STATUTES OF TEXAS BECAUSE SUIT WAS FILED IN STATE DISTRICT COURT. (Germane to Appellant's First Point of Error.)

Counterpoint Two

ARTICLE 1995, SUBDIVISION 25, REVISED CIVIL STATUTES OF TEXAS IS A MANDATORY VENUE

STATUTE AND SUPERSEDES THE GENERAL VENUE PROVISION IN PERMISSIVE VENUE PROVISIONS IN ALL CASES. (Germane to Appellant's Second Point of Error.)

Counterpoint Three

ARTICLE 1995, SUBDIVISION 25 IS CONSTITUTIONAL BECAUSE IT DOES NOT DEFEAT THE EFFECTIVE ENJOYMENT OF ANY FEDERAL RIGHT. (Germane to Appellant's Third Point of Error.)

Counterpoint One (Restated)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT TEXAS LAW APPLIES AND IN SUSTAINING APPELLEE'S PLEA OF PRIVILEGE PURSUANT TO ARTICLE 1995, SUBDIVISION 25 OF THE REVISED CIVIL STATUTES OF TEXAS BECAUSE SUIT WAS FILED IN STATE DISTRICT COURT.

Argument and Authorities

The precise issue which this Court is now presented with was previously decided in *Missouri Pacific Ry. Co. v. Little,* 319 S.W.2d 785 (Tex. Civ. App.—Houston, 1958, cert. den., 80 S.Ct. 69), and to this day is still the law in Texas. In the *Little* case, a railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employers Liability Act

and suit was filed Houston, Harris County, Texas. At the State District Court level the plaintiff's employer, Missouri Pacific Railroad Company, argued by way of Plea of Privilege to remove the cause to the county in which the plaintiff resided, and in which the plaintiff's injury occurred. Missouri Pacific based its contentions on Article 1995, Subdivision 25, Revised Civil Statutes of Texas which pertains exclusively to railway personal injuries. The Harris County District Court overruled the railroad's Plea of Privilege and the railroad appealed.

The Court of Civil Appeals at Houston, Judge Werlein presiding, held that the venue section of the Federal Employer's Liability Act describes venue for suits filed in the District Courts of the United States, and not for those filed in State Court. The proposition which naturally flows from this determination is that if the injured employee chooses to sue in the State Court, in the county where he resided or was injured, then his suit is subject to the venue statutes of the State. The Court of Civil Appeals reversed and remanded with instructions to sustain the railroad's Plea of Privilege and to transfer the cause to McLennan County.

Notwithstanding the clarity of Texas law on this subject as espoused in the *Little* case, Appellant contends that the trial court erroneously sustained Appellee's Plea of Privilege because Title 45, U.S.C.A., Subsection 56 properly places venue in Harris County, Texas. Appellant is wrong. Subsection 56 provides for concurrent jurisdiction between the courts of the United Stats and of the state courts but delineates venue provisions only as to the courts of the United States (i.e. federal courts). Subsection 56 reads as follows:

> "No action shall be maintained under this chapter unless commenced within three years from the date the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent to that of the courts of the several states."
>
> 45 U.S.C.A. Subsection 56.

The language of Subsection 56 was clear enough to the Court in the *Little* case to enable it to dispel the argument that the venue provisions applied to suits filed in state district court. In Judge Werlein's own words, "It is perfectly obvious that in the first sentence of the second paragraph the Congress was undertaking to establish the venue of suits under the Federal Employers Liability Act brought in 'a district court of the United States.' Nothing is said concerning the venue of an action that is brought in a state court." *Id.* at p. 787.

Perhaps the Appellant is confusing venue with the concurrent jurisdiction provided for in Subsection 56 which presents to the plaintiff the choice of filing suit in either federal district court or state district court. Appellant exercised his choice and chose to file suit in state district court, albeit the wrong one.

With Appellant's decision to file his suit in state court there comes the burdens and advantages of the laws of the State of Texas. There is ample authority for the proposition that where an accident is brought under the Fed-

eral Employers Liability Act in Texas state court, the Texas Rules of Civil Procedure, and not the Federal Rules of Civil Procedure control. The leading case in this regard is *Thompson v. Robbins,* 157 Tex. 463, 304 S.W. 2d 111 (1957), which involved a suit based on the Federal Employers Liability Act and filed in state court. The court was posed with the same question which is asked in the present case, whether all Federal Employers Liability Act cases are to be tried in accordance with the rules of civil procedure of the state where the action is filed, or in accordance with the Federal Rules of Civil Procedure. The Supreme Court unequivocally stated that "The plaintiff invoked the jurisdiction of the state courts and the case should be tried as any other suit for damages is tried in the state courts so far as procedural matters are concerned." *Id.,* at p. 117.

The Texas Supreme Court reiterated this position in 1973 in the case of *Missouri Pacific Ry. Co. v. Cross,* 501 S.W.2d 868, 870 (Tex. 1973). Under facts similar to those in the *Thompson* case, supra, the Court determined that the Federal Employers Liability Act prescribes substantive rights of parties in cases under its provisions, but when such cases are filed in state courts, they are generally to be tried in accordance with state's own rules of civil procedure.

It is settled then that a suit based on the Federal Employers Liability Act, and filed in state court invokes the law of the State. The United States Supreme Court, in just such a case, addressed the more precise issue of which law controls venue, federal law or the state law. In *Miles v. Illinois Central Ry. Co.,* 315 U.S. 698, 62 S.Ct. 827, 830, 86 L.Ed. 1129, at page 830, Mr. Justice

Reed, in delivering the opinion of the court, made this significant statement:

> "Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of the state court suits was left to the practice of the forum."

The *Miles* decision was cited favorably by Judge Werlein in the *Little* decision, at page 788, and made use of the *Miles* rationale to justify his application of Subdivision 25 of Article 1995 of the Revised Civil Statutes of Texas to sustain the railroad's Plea of Privilege.

Appellant cites *Boyd v. Grand Trunk Western Ry. Co.,* 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), for the proposition that the right to select the form granted in Subsection 6 is a substantial right. It should be noted that the only issue in the *Boyd* case involved the validity of a contract restricting the choice of venue for an action based upon the Federal Employers Liability Act; this case does not address the issues presented in the present case. There is no question that Article 45 U.S.C.A., Subsection 56 provides for venue when suit is filed in the United States District Court, and that such right is significant, but, once again, the present suit was filed in state court by choice of the Appellant.

Appellant also relies upon *Texas & P. Ry. Co. v. Younger,* 262 S.W.2d 557 (Tex. Civ. App.—Ft. Worth, 1953, writ ref. n.r.e.), in his argument that certain rights of the Federal Employers Liability Act are substantial. Appellant failed to mention that the *Younger* case had at issue Section 51 of the Federal Employers

Liability Act. Section 51 provides that a railroad shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce, if the injury results, in whole or in part, from the negligence of any employee of the carrier or by reason of any defect or insufficiency, due to its negligence, in its cars or other equipment. In that case, the question was whether or not the inclusion of the words "in whole or in part" in a special issue on proximate cause was prejudicial error. The court determined that the rights afforded by Section 51 was a substantive right, and that such rights may not be impaired by any local statute, rule, or local practice. Again, the opinion in the *Younger* case makes absolutely no mention of the issue at bar, that being proper venue.

Appellant's arguments are aptly made, although misdirected. He has brought forth no cases to support his contentions, but has resorted to policy argument. Such arguments are not persuasive, and to accept them would be to fly in the face of existing case law at both the state and federal levels.

Counterpoint Two (Restated)

ARTICLE 1995, SUBDIVISION 25, REVISED CIVIL STATUTES OF TEXAS IS A MANDATORY VENUE STATUTE AND SUPERSEDES THE GENERAL VENUE PROVISION AND PERMISSIVE VENUE PROVISIONS IN ALL CASES.

Argument and Authorities

Appellant further contends that the Texas venue statute (Article 1995, Subdivision 25 Revised Civil Statutes of

Texas) is not a mandatory venue provision because it inures only to the benefit of the plaintiff. This contention is clearly erroneous and contradicts both the statute on its face and the case law which has interpreted it. Subdivision 25 is a mandatory venue statute and in its application the courts do not discriminate between plaintiff and defendant. The text of Subdivision 25 is as follows:

> 25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, *shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury*. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State, then such suits shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office." Article 1995, Subdivision 25, Revised Civil Statutes of Texas (emphasis added).

The subdivisions of Article 1995 may be divided into two classes, those subdivisions which are permissive or

"may" subdivisions, under which suit may be brought either in the county of the defendant's residence or in the county provided for under the permissive or "may" subdivision, and those subdivisions of the statute which are mandatory ("must" or "shall" subdivisions) which, upon proper plea by either party, require that the suit be brought in a particular county, regardless of the residence of the defendant. From the face of the statute it is apparent that Subdivision 25 is a "shall" mandatory provision.

It has been decided in Texas that when an Article 1995 exception directs that a suit must or shall be brought in a particular county (as does Subdivision 25), the requirement is mandatory and controls over other exceptions as well as the general rule. *Texas & N.O.R. Co. v. Tankersley,* 246 S.W.2d 253 (Tex. Civ. App.—San Antonio, 1952, no writ). The *Tankersley* case involved an action for personal injuries sustained by plaintiff while a passenger of the defendant railroad. The issue was whether Subdivision 24, which is a permissive venue section pertaining to carriers, or Subdivision 25 was applicable to establish venue. The court sustained the railroad's Plea of Privilege transferring the cause to the county where the injury occurred and said of Subdivision 25, "Since Subdivision 25 is mandatory, we think that it is the one which fixes the venue for Appellee's suit for damages against a railroad corporation for her claimed damages arising from personal injuries." *Id.,* at p. 254.

The court again squarely faced this question in the now widely cited opinion of *Lewis v. Gulf, Colorado & S.F. Ry. Co.,* 229 S.W.2d 395 (Tex. Civ. App.—Galveston, 1950, writ dism'd.). This case was an action

for the recovery of damages for personal injuries sustained in Hardin County, Texas, while plaintiff was an employee of the defendant railroad. Suit was filed in Galveston County in which the railroad has its domicile, office and place of business. The railroad filed its Plea of Privilege to have the cause transferred to Hardin County pursuant to Subdivision 25 of Article 1995, thus presenting the court with the precise question which is now before us; whether a suit which involves a mandatory subdivision (Subdivision 25) of Article 1995, requiring that a suit must be commenced in a particular county without reference to whether or not it is the domicile of the defendant, must be transferred to the county covered by the mandatory subdivision upon the filing of the proper Plea of Privilege by the defendant. The court experienced no difficulty in determining that Subdivision 25 is mandatory and must be applied, but went further in expressly approving the applicability of Subdivision 25 when urged by a defendant. Citing numerous authorities, going back to the early case of *Kinney v. McCleod,* 9 Tex. 78, the court disposed of the issue and ruled in favor of the railroad, summarizing the law in one sentence:

> "It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above-referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of the defendant's residence, upon the filing of the proper plea." *Lewis,* supra at p. 397.

The *Little* case, supra, which parallels the present case deals a final blow to Appellant's argument concerning Subdivision 25. The *Little* court cited the *Lewis* decision as being the authority of Texas law concerning the man-

datory nature of Subdivision 25. The court did not beg the issue, and, after only citing the *Lewis* decision sufficed it to say that

> "We need not discuss further the decisions of the Texas courts holding that Subdivision 25 of Article 1995 is mandatory, . . ." *Little,* at p. 787.

Faced with conclusive authority contradictory to his position, Appellant still chose to argue that the law is wrong. His attempts to do so are shallow and without substance. His first attempt at disparaging the law was in his reliance upon *Warren v. Denison,* 531 S.W.2d 215 (Tex. Civ. App.—Amarillo, 1975, no writ hist.) from the context of which he plucked the observation that the exceptions to the general venue provision are generally recognized to be for the benefit of the plaintiff, not the defendant. These generalities to which Appellant chooses to resort are less than authoritative. The courts of Texas have without hesitation, extended the availability of Subdivision 25 to both plaintiff and defendant, without discrimination. *Little,* supra; *Lewis,* supra.

Appellant next cites a 1946 compensation suit which he apparently felt supported his position that Subdivision 25 was not mandatory. A portion of the opinion which Appellant cites in his brief makes it clear that this is not the case:

> ". . . We find it is a protective statute which guarantees Appellee venue in its home county, *if the exceptions set out in said section are not applicable." Commercial Standard Ins. Co. v. Texas & N.O.R. Co.,* 198 S.W.2d 913 (Tex. Civ. App.—Ft. Worth, 1946, no writ hist.).

It has been conclusively established that the mandates of Subdivision 25 do apply in the present case, therefore *Commercial Standard* has no application.

Finally, Appellant attempts to rationalize to the court as an applicable decision the case of *Fouse v. Gulf C. & S.F. Ry. Co.,* 193 S.W.2d 241 (Tex. Civ. App.—Ft. Worth, 1946, no writ hist.). The case is clearly inapplicable to the present fact situation even though the nature of Subdivision 25 was examined. In *Fouse,* plaintiff filed suit in Tarrant County to recover for injuries sustained in an accident which occurred in Johnson County. The defendant railroad responded with a Plea of Privilege to be sued in Galveston County, the county of its domicile. Plaintiff, in his Controverting Affidavit, stated that in the event that venue of the cause was not properly laid in Tarrant County, then the proper and only other county wherein venue lies is in Johnson County, which has the exclusive jurisdiction of the suit under Subdivision 25. Herein is where *Fouse* differs from the present case. The plaintiff chose Tarrant County as his forum, and may not, by Controverting Plea, transfer the cause to another county. The court sustained the railroad's Plea of Privilege and transferred the cause to Galveston County, but used the following language as its reasoning:

> "It appears very obvious to us that, when a Plea of Privilege is filed by a defendant, there remains but one right, as to venue, vested in the plaintiff, and that is, by a Controverting Plea, he may establish his right to maintain his suit *in the court and in the county where he filed it. Id.,* at p. 243.

The only thing that *Fouse* holds is that once plaintiff chooses to file suit in a court in which venue does not lie, he may not later seek to transfer venue.

That Appellant's arguments are unfounded is an inescapable conclusion. The law is well settled in Texas that Subdivision 25 is a mandatory venue statute which supersedes the general venue provision, and which must be applied without regard to one's position as plaintiff or defendant.

Counterpoint Three (Restated)

ARTICLE 1995, SUBDIVISION 25 IS CONSTITUTIONAL BECAUSE IT DOES NOT DEFEAT THE EFFECTIVE ENJOYMENT OF ANY FEDERAL RIGHT.

Argument and Authorities

That Article 1995, Subdivision 25 of the Revised Civil Statutes of Texas is constitutional is beyond question. Subdivision 25 was enacted in its present form in 1911, and has not been amended for constitutional reasons or any other reason since its inception. Vernon's Civil Statutes 1914 (Rev. Civ. Stat. 1911) art. 1830. Thus, the law on venue for railroad personal injuries, as mandated by Subdivision 25, has been applied without question for more than half a century. Nevertheless, Appellant now argues that even if Subdivision 25 is mandatory, it is unconstitutional because it denies Plaintiff a substantial federal right.

The precise issue of Subdivision 25's constitutionality in regard for federal law has been addressed by the

courts of this state. In *Little,* supra, which runs as a thread through all of the arguments here presented because of its identity to the present case, upholds Subdivision 25 as constitutional. The court stated very succinctly that:

> "There can be no question that the State of Texas and its courts administer and enforce Section 25, Article 1995, Vernon's Annotated Civil Statutes, prescribing venue in suits brought against a railroad, impartially and without discrimination between Federal Employers Liability Act cases and other cases in which a railroad is sued, whether such cases are interstate or intrastate.
>
> . . . (Subsection 25) fully protects the plaintiff and does not in any way deprive him of any right given him by the federal statute." *Little,* at p. 788.

The *Little* court conceded that a state cannot deprive one of the enjoyment of a federal right, but made the following very profound statement:

> "We grant that the State cannot defeat the effective enjoyment of your federal right given a citizen by a technical or local procedural device, but this rule has no application where no legal right is either defeated or curtailed. There can be no conceivable reason why the state should not have the right in such case to prescribe the venue governing the prosecution of such suit. It is clear that the Congress intended that the state should have such right." *Little,* at p. 788, 89.

Appellant bases his constitutional argument on a case which has absolutely nothing to do with venue. The case of *Arnold v. Panhandle & Santa Fe Ry. Co.,* 353

U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), stands for the proposition that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. As held by the court in *Little,* there is no question that this is a valid statement of the law. However, this rule has no application where no legal right is either defeated or curtailed. *Little,* supra, at p. 788.

Appellant has attempted to argue that Subdivision 25 is unconstitutional because it in some way denies a substantial federal right, but Appellant fails to state what "substantial federal rights" have been impinged. Appellant also, in a catch-all attempt to persuade the court with generalities, states that Subdivision 25 denies Due Process and violates the Equal Protection Clause of the United States Constitution, but again Appellant fails to say in what way. These constitutional arguments asserted by Appellant are not probative and are merely a last-ditch effort in a frivolous quest to overturn an entire body of law.

CONCLUSION AND PRAYER

Appellant has failed in his assault on the well-settled law in Texas that overwhelmingly supports the trial court's decision to sustain Appellee's Plea of Privilege. The trial court was presented with the same arguments and authorities that are brought forth in this appeal and, without hesitation, administered the law correctly. Appellant's zealous, and frivolous, attempts to eradicate a body of law which is so ingrained in the judicial system are beyond the bounds of reason.

Because Appellant failed to present authoritative support for his allegations, the trial court correctly sustained Appellee's Plea of Privilege. Accordingly, Appellee, Southern Pacific Transportation Company, respectfully prays that the judgment of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Brief was served upon W. Douglas Matthews, 810 Houston Bar Center Building, 723 Main Street, Houston, Texas 77002, attorney of record for Appellant, on the ____ day of July, 1978.

H. DANIEL SPAIN